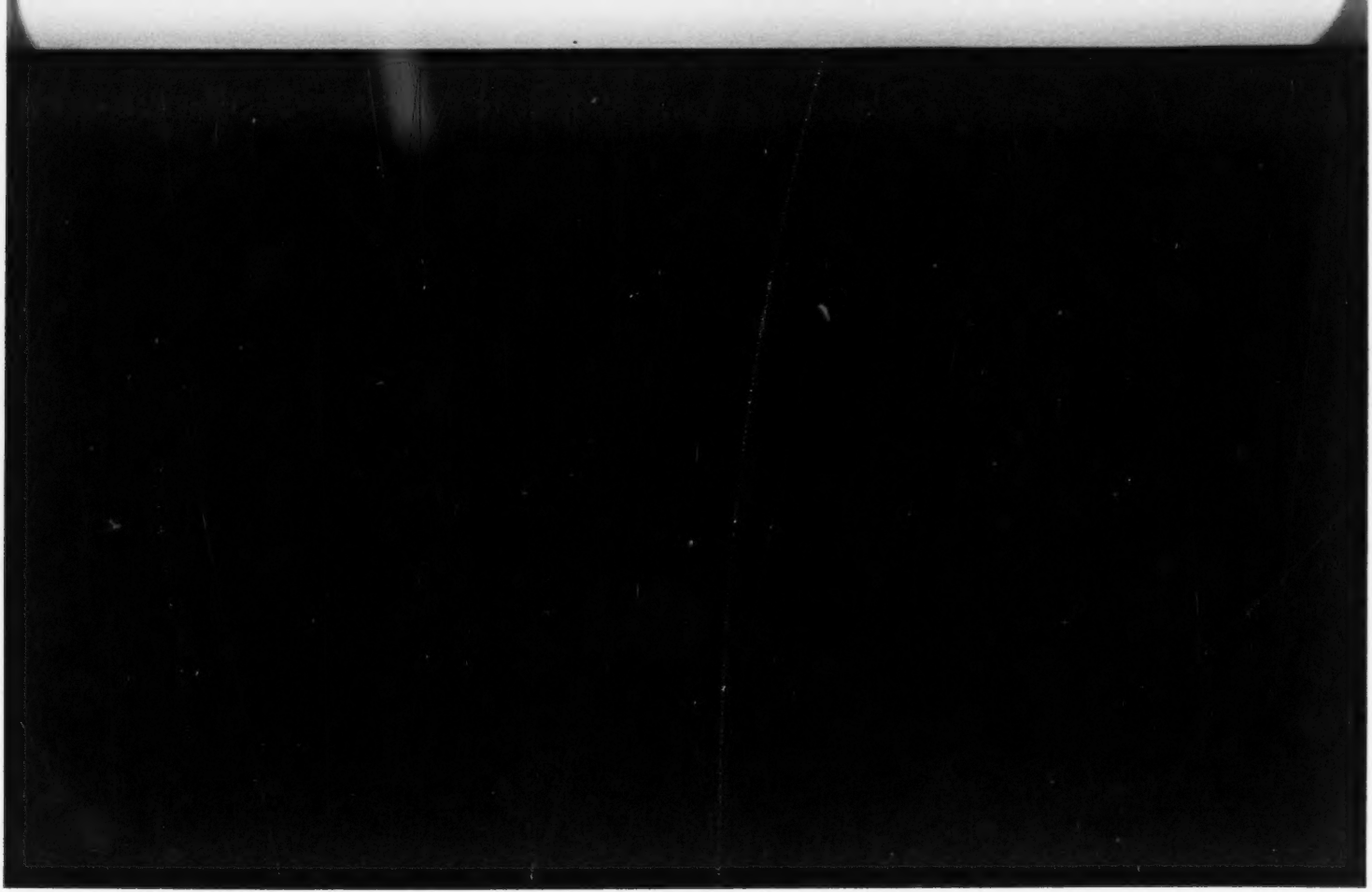

INDEX

CITATIONS

490201—42

QUESTIONS PRESENTED

(1) Whether the opinion testimony of expert witnesses, who have knowledge of the curative qualities of the drugs contained in petitioner's preparation but who have not observed the effect of actual administration of the preparation to patients, is admissible on the question of the preparation's therapeutic effect in a proceeding before the Federal Trade Commission.

(2) Whether the Federal Trade Commission refused to permit a controlled medical test of petitioner's preparation and whether the court below was required, or even authorized, to order that such a test be made.

STATUTE INVOLVED

The Federal Trade Commission Act as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U. S. C., sec. 45, provides:

> 5 (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

STATEMENT

Petitioner seeks review of the decree of the court below affirming an order of the Federal Trade Commission, issued in a proceeding under Section 5 of the Federal Trade Commission Act, directing petitioner to cease from disseminating in interstate commerce any advertisement repre-

senting that its preparation "Uvursin" is an effective treatment for diabetes or has any therapeutic value in treating that disease.[1] The court held that the Commission's order was based upon adequate findings and that the only finding attacked by petitioner—that its preparation had no therapeutic value in treating diabetes—was supported by the testimony of expert witnesses which the Commission "was clearly entitled to accept". (R. 381–383.) The court also held that other alleged errors urged by petitioner were without merit (R. 383–384).

The Commission, upon the basis of the undisputed testimony of experts, made the following findings concerning the nature of diabetes, its symptoms and treatment:

Diabetes is a disturbance of carbohydrate metabolism in which the sugar content of the blood is elevated to abnormally high levels due to improper functioning of the pancreas gland (R. 59). This gland secretes insulin into the blood stream for the absorption of carbohydrates (R. 62). Where the pancreas fails to secrete a sufficient amount of insulin, the condition known as diabetes results (*ibid.*) There may be from time to time spontaneous, temporary remissions in the dis-

[1] The Commission's order and the complaint on which it was based were issued after Section 5 had been amended by the Act of March 21, 1938, so as to prohibit, in addition to unfair methods of competition in interstate commerce, "unfair or deceptive acts or practices" in such commerce.

ease, depending partly upon the character of the diet (R. 61).

Diabetes is diagnosed by testing the blood sugar level, and also by the appearance of sugar in the urine, but the existence of diabetes or improvement in diabetic cases can be determined only by blood sugar examination and cannot be determined by examination of the urine alone (R. 59, 61).

The accepted medical treatment of diabetes consists of administering a diet calculated to reduce the sugar intake and, if this fails to reduce the blood sugar level to normal, administration of insulin[2] by hypodermic injection (R. 59, 62). Where diet proves ineffective, failure to give insulin increases the severity of the disease and may result in diabetic coma and death (R. 63).

Concerning the nature and therapeutic value of petitioner's preparation, Uvursin, and the medical testimony presented by petitioner, the Commission found, among other things:

Uvursin is composed of plant materials which have enjoyed a long reputation, particularly in folklore medicine, for the treatment of urinary conditions (R. 60).[3] Their action promotes an

[2] Insulin is an extract of the pancreatic gland of animals, discovered in 1922 (R. 63). Judicial notice has been taken of the value and importance of insulin in the treatment of diabetes. *United States* v. *Elmore*, 68 F. (2d) 551, 553 (C. C. A. 5).

[3] Petitioner does not supply any quantitative formula of the ingredients of its preparation and it admitted in its advertising that the ingredients listed "will mean practically nothing, even to the experienced therapist" (R. 60).

increased flow of urine and this increased flow reduces the percentage of sugar in the urine but does not affect the blood sugar level (R. 60–61). Petitioner's product has no effect on the essential diabetic disturbance (R. 61). Since it does not in any way deal with the causes of the disease, it is not an efficacious treatment for diabetes (R. 62). Use of Uvursin may be definitely harmful to a patient suffering from diabetes in that it may "give a false sense of security and delay the inauguration of effective treatment" (*ibid.*).

Petitioner's medical witnesses were four practicing physicians who had used Uvursin in individual cases. Three of them had used only the urinalysis test to determine sugar. The fourth did use the blood test, but testified that he usually began his treatment with insulin and turned to petitioner's product in those cases where the patient refused to permit injection of insulin by hypodermic needle. All four physicians had employed petitioner's product in connection with the diet which it recommended.[4] The witnesses admitted that where serious recurrence of sugar in the urine appeared after discontinuance of petitioner's product, discontinuance or failure to follow the diet prescribed had also occurred (R. 63).

[4] This diet conforms closely to the type of diet that physicians recommend in diabetic cases (R. 62).

The Commission gave petitioner's medical testimony "full consideration," but concluded that in view of the spontaneous remissions characteristic of diabetes and the possible effect upon its symptoms produced by diet control, "the testimony in the record based upon experience in individual cases is of little probative value, as compared to the expert testimony in the record based upon general knowledge" (R. 63–64).

ARGUMENT

1. If the testimony of the Commission's expert witnesses was admissible, its finding that Uvursin is without therapeutic value in treating diabetes obviously is "supported by evidence" and therefore is, by the terms of the statute,[5] conclusive. Petitioner seems to contend (Pet. 20) that the fact that these witnesses were without knowledge or experience in administering Uvursin to patients made their testimony inadmissible. Not only has petitioner failed to cite any decision supporting its contention, but the authorities are uniform that medical experts are competent to give opinion testimony concerning the therapeutic value of drugs, alone or in combination, notwithstanding lack of actual experience in administering the particular drug or combination of drugs

[5] Federal Trade Commission Act as amended, Sec. 5 (c).

involved in the proceeding.[6] As the court pointed out in the *Goodwin* case (cited in note 6), expert knowledge of the curative qualities, or lack thereof, of the drug ingredients of a product makes opinion testimony as to its therapeutic value competent regardless of actual experience in use of the drugs in the exact form in which they are combined in the product in question.

Petitioner contends (Pet. 23) that the decision below is in conflict "in principle" with decisions of other circuit courts of appeals. We submit that the three decisions cited by petitioner wholly fail to sustain this contention.

Farris v. *Interstate Circuit, Inc.*, 116 F. (2d) 409, 411–412 (C. C. A. 5), held that it is error to allow a witness who is not qualified as an expert to give opinion evidence on a question which the jury, on the other evidence before it, is fully competent to determine. Not only is the holding clearly remote from the evidentiary question raised here, but that case involved the admissibility of evidence in the trial of an action before a jury,

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[6] *Justin Haynes & Co.* v. *Federal Trade Commission*, 105 F. (2d) 988, 989 (C. C. A. 2), certiorari denied, 308 U. S. 616; *Neff* v. *Federal Trade Commission*, 117 F. (2d) 495, 496–497 (C. C. A. 4); *Dr. W. B. Caldwell, Inc.* v. *Federal Trade Commission*, 111 F. (2d) 889, 891 (C. C. A. 7); *Goodwin* v. *United States*, 2 F. (2d) 200, 201 (C. C. A. 6).

See also *Kershaw* v. *Tilbury*, 214 Calif. 679, 691–692; *Boswell* v. *State*, 114 Ga. 40, 42–43; Rogers, *Expert Testimony* (3d ed. 1941), p. 72; Mundo, *The Expert Witness* (1938), pp. 38–39.

rather than in an administrative proceeding. *Kidder Oil Co.* v. *Federal Trade Commission,* 117 F. (2d) 892, 894 (C. C. A. 7), seems to be cited for the elementary proposition that a reviewing court will disregard any finding of the Commission which is not supported by any substantial evidence. The court there modified a Commission order because it found certain portions of the order not supported by substantial evidence. The case has no bearing on the question here raised. In *Capon Water Co.* v. *Federal Trade Commission,* 107 F. (2d) 516 (C. C. A. 3), the court not only affirmed the Commission's order but expressed the opinion that the order erred on the side of leniency. Petitioner, however, appears to draw some comfort from the dictum (p. 517) that if mineral waters "do possess separate curative properties, their use and so their advertising should be encouraged."

2. Petitioner contends (Pet. 15–19) that the Commission did not "permit" one of the Commission's medical witnesses to make a controlled test of Uvursin and that this was "against public policy." But, as the court below stated (R. 384), the record does not support this charge. What the record shows is that one of the Commission's medical experts volunteered the information while he was on the stand that at one time he had contemplated making a controlled test of Uvursin; that he had abandoned this plan after learning

that some patented remedies for diabetes contain a drug, very difficult to detect, which is a liver poison; and that he thereupon advised the Commission that he was unwilling to expose his patients "to that potential danger", i. e., liver poisoning (R. 109–114).[7]

Petitioner, relying upon the fact that in its reply brief filed in the court below it stated that it "consents" to a controlled medical test of Uvursin and "respectfully submitted" that a test "should be made now," contends that the court should have ordered such a test. This contention is without merit. The statute provides a remedy for adducing additional evidence.[8] Petitioner has neither availed itself of that remedy nor shown

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[7] Even if the record had shown that the Commission had blocked the making of a test by its own witness, this would not have been error. Such action would not have barred petitioner from making its own test and presenting the results thereof in evidence. (See opinion below, R. 384.)

[8] Section 5 (c) of the Act provides that the reviewing court shall affirm, modify, or set aside the Commission's order upon the basis of "a transcript of the entire record in the proceeding" before the Commission. The section further provides:

"* * * If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper."

that the prerequisites for obtaining it—the materiality of the evidence, and reasonable grounds for failing to adduce the evidence before the Commission—exist. Under these circumstances the court was not authorized, much less required, to order the taking of further evidence.

Petitioner also apparently contends that the Commission's order will put it out of business and thereby give to the manufacturers of medically used insulin a monopoly on the cure for diabetes. Even if this contention were relevant, it was not urged before the Commission, and no evidence was introduced to support the allegation of monopoly. The court below correctly decided that there was no merit in this contention.

CONCLUSION

The decision below was correct, and there is no conflict with decisions in other circuits. It is therefore respectfully submitted that the petition for writ of certiorari be denied.

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